

THE TRUE MEANING OF THE ESTABLISHMENT CLAUSE

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INTRODUCTION

Perhaps no provision of the Constitution has been the subject of as much debate and controversy as the Establishment Clause of the First Amendment. (“Congress shall make no law respecting an establishment of religion”) Different interpretations of the Establishment Clause abound. However, although many interpretations of the Clause have been offered, in the last few decades there have been primarily two opposing viewpoints: One view is that the Establishment Clause commands strict government neutrality on all religious issues, including neutrality between religious beliefs and nonreligious beliefs. The other view is that the Establishment Clause only forbids the government from favoring one religion over others, but does *not* prevent government from aiding religion in general, as long as it does so evenhandedly. The latter interpretation is often referred to as the “nonpreferentialist” view. Several Supreme Court justices, including the late Chief Justice, William Rehnquist, have endorsed the nonpreferentialist interpretation. However, a majority of the Court has rejected this interpretation and has ruled that the government must be neutral between believer and nonbeliever.

Although the currently prevailing view is that the Establishment Clause mandates neutrality between belief and nonbelief, this position is continually being challenged. Obviously, those who favor unrestricted aid to religion and symbolic endorsement of religious beliefs continue to argue in favor of the nonpreferentialist interpretation. The stakes in this controversy are high. If the nonpreferentialist position is accepted, we may see coercive prayer and religious instruction in the public schools, religious symbols and ceremonies in public places, and government funds being funneled in large amounts to religious organizations. We may also

witness expanding censorship and substitution of religious accounts of the origins of life in place of evolution.

It is the purpose of this position paper to examine critically and objectively the intent of the Founders in proposing and adopting the First Amendment and, in doing so, to determine the proper interpretation of the Establishment Clause. We will begin by summarizing the arguments that have been advanced in favor of the nonpreferentialist interpretation. We will then consider the history behind the First Amendment, in particular the views and actions of Madison and Jefferson, whose beliefs about the separation of church and state are universally acknowledged as critical in understanding the intent of the First Amendment. We will also examine in detail the debates in the First Congress concerning the Establishment Clause and the evolution of the draft language as the Clause was considered by the House, Senate, and subsequently a conference committee. Contrary to the claims of the nonpreferentialist camp, the views of Jefferson and Madison, in combination with the evolution of the language of the Clause in the First Congress, demonstrate convincingly that Congress did not intend to permit government support of religion. Indeed, the First Congress explicitly considered and rejected draft amendments that would have prohibited Congress only from giving preference to one religion over others. When the views of Jefferson and Madison and the legislative history of the Establishment Clause are thoroughly examined, the conclusion that has the most historical support is that the Founders intended to prohibit any aid to religion and to require strict neutrality between believer and nonbeliever.

THE NONPREFERENTIALIST INTERPRETATION

A number of scholars and jurists have advocated the nonpreferentialist interpretation of the Establishment Clause. However, probably the most influential statement of this position is contained in the dissenting opinion of William Rehnquist in *Wallace v. Jaffree*, 472 U.S. 38 (1985), which was written a year before Rehnquist became Chief Justice. In this case, the Supreme Court struck down as unconstitutional an Alabama moment-of-silence statute because the history of the enactment of this statute revealed that it was intended by the state legislature as a vehicle for reintroducing state-sponsored prayer in Alabama public schools. In his dissent, Rehnquist argued vigorously that the Founders never intended the First Amendment to require government neutrality between “religion and irreligion.” 472 U.S. at 113.

Let us examine Rehnquist’s argument. Rehnquist begins his dissenting opinion by rejecting the metaphor of a “wall of separation between church and state” as “misleading.” He notes that Jefferson coined this phrase in 1802, about thirteen years after Congress proposed the Bill of Rights. He also notes that Jefferson was in France at the time of the adoption of the Bill of Rights and suggests that this fact means that Jefferson is “a less than ideal source of contemporary history as to the meaning of the Religion Clauses of the First Amendment.” 472 U.S. at 92.

Having dismissed the relevance of Jefferson’s views, Rehnquist then invites us to focus on the debates in the First Congress over the First Amendment and some (but significantly, not all) of the different versions of the amendment that were proposed. The evidence that Rehnquist presents is both positive and negative in nature. The positive evidence derives principally from some remarks Madison made during the debate in the House of Representatives. The language under consideration at the time was the language that emerged from the House Select

Committee. The proposed amendment provided that: “No religion shall be established by law, nor shall the equal rights of conscience be infringed.” One of the representatives expressed the concern that this language might prohibit courts from hearing lawsuits that sought to compel parishioners to fulfill their financial commitments to churches.

Madison responded to the representative’s remarks by stating that the insertion of the word “national” before the word “religion” in the draft amendment would take care of this concern. Madison then added that he thought the amendment was designed to prevent one or more sects from obtaining “a pre-eminence” in the country as a whole and establishing “a religion to which they would compel others to conform.” From this exchange, Rehnquist infers that it is “indisputable” that Madison viewed the amendment only as a means “to prohibit the establishment of a national religion, and perhaps to prevent discrimination among sects.” 472 U.S. at 98.

With respect to the negative evidence, Rehnquist points out that nowhere in the records of the debate did Madison or anyone else specifically state that the amendment was designed to require the government to be neutral between believers and nonbelievers.

From this positive and negative evidence, Rehnquist concludes that those who proposed and adopted the First Amendment were “definitely not concerned about whether the government might aid all religions evenhandedly,” and that there is not “the slightest indication” that they thought the government had to be “absolutely neutral as between religion and irreligion.” 472 U.S. at 99. Rehnquist concludes his dissent by saying that nothing in the First Amendment prohibits any generalized endorsement of prayer or other aspects of religious belief. 472 U.S. at 113.

Rehnquist's argument has been influential, but an objective analysis of the evidence Rehnquist presents reveals that it is unconvincing. Most importantly, he ignores some critical evidence, including versions of the amendment that were rejected in the Senate that would have allowed for nonpreferential aid to religion. In addition, Rehnquist improperly ignores the struggles over religious liberty that took place immediately before the debate over the Bill of Rights. The First Amendment did not just pop into the heads of the Founders from nowhere. In the 1780's there were vigorous debates over the scope of religious freedom, especially in Virginia. In the Virginia debates, both Madison *and Jefferson* played leading roles. Furthermore, even though Jefferson was in France at the time of the First Congress, he regularly corresponded with Madison, and many historians agree that Jefferson was instrumental in persuading Madison to push for a Bill of Rights. It is historically inaccurate to infer that Jefferson had little role in shaping the First Amendment. Taken together, all these points effectively disprove Rehnquist's thesis. A more detailed discussion of these points follows.

JEFFERSON AND MADISON: ARCHITECTS OF FREEDOM OF CONSCIENCE

While the future fourth president of the United States, James Madison, was the principal drafter of the First Amendment, his main ally and mentor in the realm of relations between government and religion was the future third president of the United States, Thomas Jefferson. The efforts of these two men, along with the Framers of the original Constitution and the members of the First Congress, leave a clear historical record that those who drafted the Constitution and the First Amendment intended government neutrality in matters of religion and did not intend to allow government to favor belief over nonbelief.

In June, 1779, Jefferson was elected governor of Virginia. Shortly thereafter, he had introduced into the Virginia legislature a bill to establish religious freedom. This proposed statute provided that a person's civil rights should not depend in any way on that person's opinions on religion. Further language stated that everyone should be free to profess and to argue for any view on matters of religion, and that no one's legal rights should depend in any way on those views, whatever they may be. Most significantly, the bill proposed that "no man shall be compelled to frequent *or support* any religious worship, place, or ministry whatsoever" (Stokes 1950, pp. 392-394) (emphasis added).

James Madison was, at the time of the bill's introduction, a member of the council of state, an advisory body to the governor. Thus began a lifelong collaboration between these two great Founders. One of their primary areas of collaboration was in securing religious freedom, first in Virginia and then in the entire United States. One of the leading scholars of church-state relations in the United States concludes that although "Jefferson is almost entirely responsible for ... composition [of the Virginia statute for religious freedom], James Madison was the most potent force in securing its adoption" (Stokes 1950, p. 392).

This struggle to secure religious liberty was not easy. The introduction of Jefferson's bill commenced a seven-year effort to secure religious freedom in Virginia, as the bill was defeated when first introduced and was not adopted until 1786. In fact, Jefferson was already in France at the time it was finally adopted. Based on Rehnquist's facile reasoning, this could imply that we should not look to Jefferson's views to understand the significance of this statute. Obviously, such reasoning is fallacious. Jefferson drafted the bill and Madison helped oversee its eventual enactment into law. Madison later used the bill as a model for the First Amendment. Thus, Jefferson's influence on the First Amendment was exercised through Madison.

Not only was Jefferson's bill not enacted at first, but a few years after introduction of this measure, opponents of religious liberty (including Patrick Henry) actually tried to enact a measure that would have imposed a tax or assessment to support the clergy of the various Christian denominations in Virginia. In 1785, Henry pushed the legislature to adopt his proposal for religious assessments. It was in opposition to this proposal that Madison wrote his famous *Memorial and Remonstrance* (reprinted in Alley 1985, p. 56). In other words, Madison wrote in opposition to "nonpreferentialist" support of religion. In support of his position, Madison wrote that the religion of every person must be left to the conviction and conscience of that person. Madison went on to argue that our opinions in matters of religion depend only upon the evidence contemplated by our own minds and cannot follow the dictates of others. Addressing the argument of proponents of the assessment that it only required a small contribution from taxpayers, Madison also warned that the same government authority that can force someone to contribute "three pence" to any individual religious establishment can also compel other types of support for any other religious establishment in all cases. Madison's efforts were successful in defeating the assessment proposal.

From this we can already see that Madison opposed government aid to religion, even when this aid was distributed among religious institutions generally. Madison and Jefferson were both adamantly opposed to any mixing of religion and government and thought it critical that the state should not support or endorse any religious belief (or nonreligious belief). Jefferson's views on this issue can be gleaned from his writings around this time. For example, in his *Notes on Virginia* (written in 1787) he observed:

The legitimate powers of government extend to such acts only as are

injurious to others. But it does me no injury for my neighbor to say there are twenty gods or no god. It neither picks my pocket nor breaks my leg. (Koch and Peden 1944, p. 275).

Simply put, religious matters lie entirely outside the purview of government. The state has absolutely no business in suggesting, endorsing or enforcing any type of belief about gods.

As indicated, Jefferson's bill was finally adopted by the Virginia General Assembly in 1786. Madison reintroduced the bill shortly after the assessment battle was over, sensing that the time was ripe to have the bill adopted. His sense of timing was correct. The Virginia Statute for Religious Freedom became the first major enactment of any legislative body in the world for protecting freedom of conscience against the tyranny of any religious majority. Jefferson was enormously proud of this accomplishment, and it is one of the three achievements noted on his tombstone. Scholars have concluded that the passage of this bill was highly influential, and helped shape the views of many regarding the relationship between church and state: "[O]wing to the political leadership of Virginia at this formative period in our history, and the high standing of her statesmen in the Federal Constitutional Convention, the document had a very great influence on establishing religious freedom in this country" (Stokes 1950, p. 394). Acknowledging Jefferson and Madison's collaboration is thus critical for having a proper understanding of the Establishment Clause.

THE CONSTITUTION

In the summer of 1787, fifty-five delegates gathered in Philadelphia to draft the original Constitution of the United States. The original Constitution itself has only one provision that addresses religion and that is a provision that draws a sharp boundary between church and state. In Article VI, Clause 3, the Founders prohibited all religious tests for public office. (“no religious test shall ever be required as a Qualification to any Office or public trust under the United States”). That this provision is the sole reference to religion in our Constitution is both truly remarkable and significant. As some scholars have noted:

God and Christianity are nowhere to be found in the American constitution, a reality that infuriated many at the time. The U.S. Constitution ... is a godless document. Its utter neglect of religion was no oversight; it was apparent to all. Self-consciously designed to be an instrument with which to structure the secular politics of individual interest and happiness, the Constitution was bitterly attacked for its failure to mention God or Christianity. (Kramnick and Moore 1997, pp. 27-28).

It is also significant that during their deliberations, when they had difficulty working out consensus on various issues, the delegates specifically refused suggestions that they pray for guidance (Pfeffer 1967, p. 122).

The Founders understood that the prohibition of any religious test meant not just that persons seeking public office could not be required to subscribe to a particular religious belief, but that they could not be required to subscribe to *any* religious belief. Madison, in *Federalist No. 52*, defended the prohibition of any religious test for public office. He wrote that public office should be open to “merit of every description” without regard to any “profession of religious faith” (Rossiter 1961, p. 326). Similarly, on October 17, 1788, in a letter to Jefferson, Madison was contemptuous of the objections to the prohibition of any religious test for office because those objections were rooted in a prejudiced concern over “Jews, Turks & infidels”

being elected to office (Alley 1985, p.72). Madison wrote that the “rights of conscience” would be substantially narrowed if “submitted to public definition.” Moreover, as the United States Supreme Court has noted, *Torcaso v. Watkins*, 367 U.S. 488, 495 n. 10 (1961), during the ratification debates on the Constitution, James Iredell, later to become a justice of the Supreme Court, argued in favor of the prohibition against any religious tests for office by saying that if we are to value religious liberty, we must allow “pagans” and those “who have no religion at all” to be elected to office.

The prohibition of a religious test for public office is, considered by itself, persuasive evidence that the Founders did not want government favoring religion, even before the adoption of the Bill of Rights. Ironically, however, the fact that the Constitution did have one provision addressing religion, namely the prohibition of any religious test, caused some anxiety to those who wanted a secular state. In their view, having any provision that addressed religion, even one prohibiting a religious test, suggested that government had some authority in religious matters. Edmund Randolph, in fact, wrote to Madison and asked him whether Article VI did not imply that Congress had “power over religion” (Kramnick and Moore 1997, p. 44).

Randolph’s concern reflected a worry that many Americans had at this time about having a federal government that was too strong. Those who favored the Constitution had to insist that the federal government was solely a government of limited, delegated powers. This is one of the persistent themes of *The Federalist*. On this view, the federal government would have authority over a certain area only if the Constitution stated it would have such authority. Therefore, the mere mention of religion in the Constitution, even in the context of a provision prohibiting a religious test, concerned some who were strongly in favor of a separation of church and state.

The belief that the federal government had only those powers that were expressly delegated to it also explains, in part, Madison's initial ambivalence regarding a bill of rights. Many contemporary Americans find it difficult to believe that the person most responsible for our Bill of Rights was initially undecided regarding the wisdom of adding a list of rights to the Constitution. This was *not*, of course, because Madison opposed free speech, free press, freedom of religion, etc. Rather, he was concerned that in enumerating certain rights, the Constitution might be mistakenly interpreted by some to imply that the federal government still would have the power to limit those rights in areas of conduct not fully set forth in the body of the Constitution. Moreover, he was concerned that in setting forth some rights, other important ones might be omitted, and some might mistakenly conclude that the people did not possess those rights that were not explicitly enumerated. Finally, he wondered whether a bill of rights would be effective overall, because a tyrannical majority might ignore the protected freedoms anyway.

Madison expressed his ambivalence in a letter to Jefferson dated October 17, 1788 (Alley 1985, pp. 72-74). Jefferson's reply on March 15, 1789 is one of the most important letters in American history. It had a profound influence on Madison and was the decisive factor in persuading Madison that he should push for a bill of rights (Levy 1999, p. 33). Regarding the concern that enumerating certain rights might imply that the government had control over those rights, Jefferson responded that this objection ignored the fact that the Constitution already referred to various powers of the federal government, that these powers could be abused, and a bill of rights would act as a check on these potential abuses. Therefore, a bill of rights was necessary to clarify the limits on government authority. Regarding the concern that a bill of rights might be imperfectly drafted, Jefferson replied that worries about possible omissions should not prevent Madison from securing what rights he could. As Jefferson noted, "Half a loaf

is better than no bread” (Koch and Peden 1944, p. 463). Finally, regarding Madison’s concern that a bill of rights might prove powerless against the tyranny of the majority, Jefferson pointed out that an independent judiciary should provide a bulwark against an oppressive majority (pp. 462-464). Madison was persuaded by these points and decided to propose amendments to the Constitution during the First Congress. Once again, the collaboration between Jefferson and Madison proved critical in preserving religious liberty and the equality of the nonbeliever.

Before Madison’s draft and introduction of the First Amendment, he and Jefferson had already demonstrated their firm commitment to a form of government that does not in any way favor religious belief over nonbelief. The stage was now set for enshrining these principles into the Bill of Rights, the first ten amendments to the original Constitution.

THE FIRST AMENDMENT IS BORN

On June 8, 1789, Madison, as a member of the House of Representatives, introduced into Congress proposed amendments to the Constitution, one of which initially read, in relevant part:

The civil rights of none shall be abridged on account of religious belief or worship, nor shall any national religion be established, nor shall the full and equal rights of conscience be in any manner, or on any pretext, infringed. (1 Annals of Congress 452.)

This set in motion a prolonged series of proposed modifications and rival amendments over the next three and a half months, resulting in the final version of the First Amendment that was jointly approved by the House and Senate in September of 1789 and then sent to the states for ratification. It is now time to examine in more detail Justice Rehnquist’s assertion that the debates in the First Congress and the evolution of the language of the First Amendment show

that the Framers only meant to prohibit government favoritism of one religion over others. To the contrary, an examination of the debate and of the language of proposed and rejected amendments shows that the Framers intended to prohibit the government from aiding religion in general and from favoring the believer over the nonbeliever.

Let us first examine Madison's proposal, in the debate on August 15, 1789, to insert the word "national" before the word "religion" in the language of the amendment. Recall that Rehnquist insists that this shows that Madison only intended to prohibit the establishment of a national religion. To find the most likely explanation for Madison's proposal we need to remind ourselves that a few states had established churches at this time. Indeed, Massachusetts maintained its established church until the 1830s. (The First Amendment, as originally adopted and ratified, limited only the federal government, not the states. It was only in 1947 that the Supreme Court first explicitly held that the Establishment Clause limited what the states could do.) Thus, the most likely explanation of Madison's proposed addition of the word "national" is that Madison, to allay some concerns about the effect of the amendment on state establishments, merely wanted to emphasize that the Establishment Clause bound only the federal government. This conclusion is buttressed by the fact that Madison made his proposal in response to a comment from a representative expressing concern that the proposed amendment might prevent churches from enforcing financial commitments made by their members. Furthermore, as already indicated, Madison's initial proposed language (subsequently revised by the House Select Committee) also included the word "national" before "religion," so not much can be made of Madison's suggestion to add this word during a later debate.

In any event, Madison's proposal was rejected by his fellow members. Even if we acknowledge, as we should, Madison's important role in the development of the First

Amendment, it is logically unsound to argue for a particular interpretation of the amendment on the basis of modifying language that was considered *and rejected*. Thus, Madison's proposal to add the word "national" and the remarks he made in support of that proposal do not show that the Establishment Clause allows for nonpreferential aid to religion.

The language that the House eventually approved on August 20, 1789 was the following: "Congress shall make no law establishing religion, or to prevent the free exercise thereof, or to infringe the rights of conscience" (1 Annals of Congress 766). This language is obviously very similar to the final language of the First Amendment, but arguably narrower. It prevents a law establishing religion but not any law "respecting an establishment of religion." However, before Congress adopted the final version, the proposed amendment first had to be considered by the Senate. Here is where things become interesting.

On September 3, 1789, three motions proposing alternative amendments were defeated in the Senate. Two out of the three proposed amendments would have explicitly restrained government only from favoring one religion over another, and all three of them were less restrictive of government action than the House version of the amendment. The first proposed amendment rejected by the Senate stated: "Congress shall make no law establishing one religious sect or society in preference to others." The second proposed amendment to be rejected read: "Congress shall not make any law infringing the rights of conscience or establishing any religious sect or society." The final defeated proposed amendment said: "Congress shall make no law establishing any particular denomination of religion in preference to any other" (Laycock 1986, p. 880; Levy 1986, p. 82).

If the first and third of these proposed amendments had ultimately been approved by Congress and ratified by the states, then clearly Rehnquist and other nonpreferentialists would

have ample support for their claim. Indeed, nonpreferentialism would have become the law of the land. However, as indicated, none of these proposals prevailed. The Senate explicitly rejected nonpreferentialism. Instead, in a confusing sequence of votes, the Senate first broadened the scope of the amendment significantly and then narrowed it. First, it accepted a proposal that spoke of religion in general terms: “Congress shall make no law establishing religion, or prohibiting the free exercise thereof.” However, a week later, the Senate changed its mind and produced an extremely limited version of the amendment: “Congress shall make no law establishing articles of faith or a mode of worship, or prohibiting the free exercise of religion” (Laycock 1986, pp. 880-881; Lindsay 1990, p. 19).

This is the version of the amendment that the Senate returned to the House of Representatives. Fortunately for the history of this country, the House rejected this version and the Senate and House formed a conference committee to resolve their differences. The version of the amendment that emerged from the committee is the one that was adopted and ratified and now embodied in the First Amendment: “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.”

The final language of the amendment contains the most sweeping restrictions on the government of any of the versions considered by either house. Significantly, it forbids any law respecting, that is relating to, an establishment of religion; therefore, it forbids any law that promotes (or disfavors) religion in any way. Obviously, this would include laws that give aid to religion generally, even on a nonpreferential basis.

In interpreting the Constitution, as is true in interpreting any legal document, we should focus on the document’s final language, but consideration of earlier drafts can be instructive regarding the intent behind the final text. Here we have seen that the House and the Senate

considered language that was less clear on government neutrality than the final version and rejected that language. Two of the specific proposals rejected were draft amendments that would have prohibited Congress only from giving preference to one religion over others. In other words, Rehnquist's interpretation of the First Amendment was expressly considered and rejected. Therefore, the conclusion that is most justified, both historically and analytically, is that the First Amendment does more than merely require the government to be neutral among the various religions.

Justice Souter, in his concurring opinion in *Lee v. Weisman*, 505 U.S. 577, 609 (1992), agrees with this analysis. Souter points out that Madison came to his initial draft of what ultimately was to become the First Amendment after having collaborated with Jefferson on the Virginia Statute for Religious Freedom a few years earlier. 505 U.S. at 615. Madison was thus committed to government neutrality in matters of religion and opposed to allowing government to favor religion generally over nonbelief. Moreover, the final language of the First Amendment that emerged, as a result of a joint conference between the House and Senate, adopted language even more forceful in mandating government neutrality than what was set forth in Madison's initial formulation of the amendment. Finally, the falsity of all narrow interpretations of the Establishment Clause, including the nonpreferentialist position, is decisively confirmed by the fact that Congress "repeatedly considered and deliberately rejected ... narrow language and instead extended their prohibition to state support for 'religion' in general." 505 U.S. at 614-615.

To sum up: we have the collaboration of Jefferson and Madison on government neutrality in matters of religion and securing equal rights for believers and nonbelievers in the years leading up to the enactment of the First Amendment. We have Madison's submission of the initial draft of what was to become the First Amendment and his leading role in pushing for

adoption of this amendment. Then, we have the First Congress's further strengthening of the separationist language contained in Madison's initial draft. All of these factors make it clear that the Framers of the Establishment Clause intended both to prevent government from showing favoritism to any one religion *and* to prevent government from favoring religion in general over nonbelief. This is the conclusion that has been reached by many scholars (Laycock 1986; Levy 1986; Lindsay 1990), and it is the most accurate conclusion that can be drawn from a thorough study of the relevant history.

THE STATEMENTS AND POSITIONS OF JEFFERSON AND MADISON AFTER THE FIRST AMENDMENT WAS ENACTED

As indicated, Jefferson and Madison engaged in a close collaboration that ultimately led to Madison's initial introduction of the First Amendment into Congress. Scholars and many of the justices of the Supreme Court regard the views of both of them on church/state separation and on the meaning of the Establishment Clause to be highly relevant to the proper interpretation of the Clause (Alley 1985, esp. pp. 303-305; Kurland and Lerner 1987). A survey of the views of Jefferson and Madison properly includes the opinions they expressed regarding the interpretation of the Establishment Clause following the enactment of the Bill of Rights.

Perhaps the most definitive expression of Jefferson's views came in his January 1, 1802, letter to the Danbury Baptist Association. Although former Chief Justice Rehnquist and others have tried to dismiss this letter as irrelevant to the interpretation of the Establishment Clause, the fact is that Jefferson himself wrote the letter, in part, to explain his understanding of the First Amendment. The relevant portion of this letter states: "Believing with you that religion is a matter which lies solely between man and his God ... I contemplate with sovereign reverence

that act of the whole American people which declared that their legislature should make ‘no law respecting an establishment of religion or prohibiting the free exercise thereof,’ thus building a wall of separation between Church and State” (Kurland and Lerner 1987, p. 96).

Jefferson’s justly famous letter does not stand alone as a clue to his understanding of the Establishment Clause. Jefferson also refused to issue proclamations of thanksgiving during his presidency. In his second inaugural address, on March 4, 1805, he stated that for himself, as president, there will be “no occasion, to prescribe...religious exercises...” (Peterson 1984, p. 520)

Part of Jefferson’s motivation for insisting on a strict separation between church and state derived from his well-founded belief that interference by religious institutions in government and public policy threatened our liberties. In 1800, the year of his first election to the presidency, Jefferson wrote to Jeremiah Moor: “The clergy, by getting themselves established by law and ingrafted into the machine of government, have been a formidable engine against civil and religious rights” (Coates 1995). In 1813, he wrote to Alexander von Humboldt:

History, I believe, furnishes no example of a priest-ridden people maintaining a free civil government. This marks the lowest grade of ignorance of which their civil as well as religious leaders will always avail themselves for their own purposes. (Lipscomb and Bergh 1902-03, p. 14:21).

In 1814, Jefferson wrote to Horatio Spafford:

In every country and in every age, the priest has been hostile to liberty. He is always in alliance with the despot, abetting his abuses in exchange for protection of his own. (Lipscomb and Bergh 1902-03, p. 14:119).

An exceptionally powerful demonstration of where Jefferson stood with respect to strict government neutrality in matters of religion and the full equality of nonbelievers, can be seen in

his *Autobiography*, dated January 6, 1821. In a magnificent paragraph, Jefferson talks about how the Virginia Statute for Religious Freedom was meant to secure protection for all points of view on matters of religion and how an attempt to show preference for Christianity, by inserting a reference to Jesus Christ into the statute's preamble, was defeated. Jefferson then exults in the result that nonbelievers are to enjoy equal protection under the law. His precise words are:

[T]he insertion was rejected by a great majority, in proof that they meant to comprehend, within the mantle of its protection, the Jew and the Gentile, the Christian and Mahometan, the Hindoo, and Infidel of every denomination. (Koch and Peden 1944, p. 47).

To give full equality under the law to “the Infidel of every denomination” constitutes powerful evidence that Jefferson, Madison's closest partner and confidant in church/state separation, had always intended that government be neutral in matters of religion and that government be prohibited from betraying any favoritism for belief over nonbelief.

Following the enactment of the Bill of Rights, Madison was also very prolific in his written statements regarding the meaning of the Establishment Clause. He expressed some of these opinions during his presidency. During the first three years of his presidency, he followed Jefferson's lead and refused to issue proclamations calling for days of thanksgiving and prayer. Under political pressure, he did issue such proclamations during the War of 1812, which was a decision he subsequently regretted, as he explained in his famous “Detached Memoranda,” which were written around 1817. There he stated that such proclamations imply that government can function as “a religious agency,” which is “no part of the trust delegated to political rulers” (Kurland and Lerner 1987, p. 105). In these same papers, Madison argued against having chaplains in Congress, arguing that the “Constitution of the U.S. forbids everything like an

establishment of a national religion” (p. 104). In addition, Madison, while president, went so far as to veto a bill that incorporated a church on the ground that merely by giving legal status to this church, Congress would be creating “a religious establishment by law” (p. 99). Significantly, these positions of the initial author of the First Amendment are strikingly more opposed to government support of religion than the views expressed by most politicians today. No one could imagine any major political figure today, with viable aspirations to the presidency, stating that Congress should not have chaplains paid for by public funds and that presidents should not issue proclamations of thanksgiving with any religious implications.

Furthermore, Madison opposed tax exemptions for the property owned by religious organizations. In giving examples in his “Detached Memoranda” of violations of the principle of government neutrality in matters of religion, Madison cited attempts in Kentucky to “exempt houses of worship from taxes” (Kurland and Lerner 1987, p. 103). Madison also warned against accumulation of property by religious organizations, generally. He noted that “besides the danger of a direct mixture of Religion and civil government, there is an evil that ought to be guarded against in the indefinite accumulation of property from the capacity of holding it in perpetuity by ecclesiastical corporations.” Madison thought the growing wealth acquired by religious institutions “never fails to be a source of abuses” (p. 103). These positions of Madison, at the very least, compel the conclusion that Madison regarded even “nonpreferential” assistance to religion to be constitutionally impermissible.

In light of the strict separationist perspective clearly articulated throughout the lives of the principal author of the First Amendment—Madison—and his closest confidant and partner in matters of separating religion from government—Jefferson—their clear intent to prohibit government from betraying any favoritism for believers over nonbelievers is unmistakable.

Therefore, the most plausible interpretation of the First Amendment -- in fact, the most historically defensible interpretation -- is that the Framers did intend to establish a government that was required to be neutral in matters of religion and that was required to treat the nonbeliever as fully equal under the law.

THE SUPREME COURT HAS RECOGNIZED THAT THE FIRST AMENDMENT REQUIRES GOVERNMENT NEUTRALITY IN MATTER OF RELIGION

Fortunately, a majority of the Supreme Court has always endorsed this understanding of the First Amendment. Starting in 1947, the Supreme Court began what is up to now an unbroken line of decisions in which it has proclaimed that the First Amendment means that no branch of government can favor the believer over the nonbeliever. *Everson v. Board of Education*, 330 U.S. 1, 15-16. Indeed, the Supreme Court has, by majority vote, adopted language that explicitly states:

We repeat and again reaffirm that neither a State nor the Federal Government can constitutionally force a person to ‘profess a belief or disbelief in any religion.’ Neither can constitutionally pass laws or impose requirements which aid all religions against nonbelievers. (*Torcaso v. Watkins*, 367 U.S. 488, 495 (1961)).

In 1985, a majority of the Court fleshed out a thorough statement affirming that the First Amendment protects those who harbor all points of view on matters of religion, including nonbelievers, by declaring that the Court has always:

unambiguously concluded that the individual freedom of conscience protected by the First Amendment embraces the right to select any religious faith, or none at all. This conclusion derives support not only from the interest in respecting the individual’s freedom of conscience,

but also from the conviction that religious beliefs worthy of respect are the product of free and voluntary choice by the faithful, and from recognition of the fact that the political interest in forestalling intolerance extends beyond intolerance among Christian sects—or even intolerance among ‘religions’—to encompass intolerance of the disbeliever or uncertain. (*Wallace v. Jaffree*, 472 U.S. 38, 53-54 (1985)).

Similarly, in 2000, the Court held by a 6 to 3 majority that government sponsorship of a religious message is:

impermissible because it sends the ancillary message to members of the audience who are nonadherents that ‘that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community’. (*Santa Fe Ind. School Dist. v. Doe*, 530 U.S. 290, 309-310 (2000)).

Another way of wording the true meaning of the Establishment Clause was expressed, again, by Justice O’Connor in an important concurring opinion, when she said that no branch of government can “treat people differently, based on the God or gods they worship or don’t worship.” *Board of Education of Kiryas Joel v. Grumet*, 512 U.S. 687, 714 (1994).

In referring to an unbroken line of decisions since 1947, this paper is not implying that there were decisions prior to 1947 that adopted a different understanding of the Establishment Clause. The reality is that until the 1940’s, the Supreme Court had little occasion to address the meaning of the Establishment Clause. Though Madison at one time attempted to have adopted an amendment that, among other things, would have prevented state governments from violating “equal rights of conscience” (1 Annals of Cong. 452), the First Amendment, as ultimately passed and ratified, restrained only the federal government. However, in 1868, the nation ratified the Fourteenth Amendment to the United States Constitution. The Fourteenth Amendment places limits on the extent to which state power can be exercised against individuals; specifically it

provides that states do not have the power to “deprive any person of life, liberty or property, without due process of law.” In determining the meaning of “due process,” the Supreme Court has, in this century, looked to the Bill of Rights for guidance. Although the Court has not definitively held that the entire Bill of Rights is applicable to the states, it has selectively “incorporated” most provisions of the first eight amendments into the “due process” clause on the ground that these rights embody fundamental principles of liberty and thus it makes sense to deem the limits imposed on the federal government by these provisions to be imposed on state governments, also. To hold otherwise would allow state governments to nullify these fundamental liberties, contrary to the implications of the Fourteenth Amendment.

In *Cantwell v. Connecticut*, 310 U.S. 296, 303-304 (1940), the Supreme Court first acknowledged the “incorporation” of the religion clauses of the First Amendment. The Court’s first explicit application of the Establishment Clause to state and local governments came about in the *Everson* decision in 1947, 330 U.S. 1, 15. Since that time, the Court has consistently never wavered in its majority view that the Fourteenth Amendment incorporates the Establishment Clause and that state and local governments are as powerless to favor the believer over the nonbeliever as is the federal government.

CONCLUSION

It was the intent of the Framers to create a legal system in which the believer and nonbeliever are equal before the law. The Founders intended to establish a government that is entirely neutral in matters of religion, that is, a government that is not only prevented from favoring one religion over others, but also is prevented from favoring religion in general. Any other interpretation of the Establishment Clause is historically inaccurate.

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There are several different collections of Jefferson's and Madison's writings and correspondence. Some of the commonly used print collections are set forth in the list of references. Readers should be aware that many of these documents are also available on-line. In fact, some of them are available only on-line. An especially valuable on-line collection is the one compiled by Eyler Coates and maintained by the University of Virginia (see below), which contains numerous quotations from Jefferson. Other valuable on-line sources include the collection of Madison papers of the Library of Congress, available at:

http://memory.loc.gov/ammem/collections/madison_papers/index.html

and the collection of Jefferson papers maintained by Princeton University, available at:

<http://www.princeton.edu/~tjpapers/index.html>.

Note also that The Federalist Papers are available on-line through the Library of Congress at:

<http://www.loc.gov/rr/program/bib/ourdocs/federalist.html> This version differs slightly from the Clinton

Rossiter print edition, which is widely available and is cited in the list of references.

For debates in the House of Representatives of the First Congress, this paper has relied on the Annals of Congress, which is a source used by the courts and government agencies. Readers should be aware, however, that for the first few decades, Congress did not have any official method for recording debates. Indeed, the Senate did not allow anyone to record the debates in that body, which is why we have little to no information regarding the discussion of the Bill of Rights in the Senate. The Senate Journal recorded the text of proposed amendments, so we do have a clear record of the exact language that was proposed and considered, but no record of the discussion regarding the proposals. The House, on the other hand, allowed journalists to publish reports on the debates. In the 1830s, Joseph Gales reviewed these reports, edited them, and compiled them into the Annals of Congress.

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